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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

XAVIER M. BABERS,

Defendant and Appellant.

B208811

(Los Angeles County
Super. Ct. No. BA308554)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charlaine F. Olmedo, Judge. Reversed and remanded for resentencing.

David D. Martin, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior
Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys
General, for Plaintiff and Respondent.

SUMMARY

Xavier Babers was convicted of multiple counts of second degree robbery and assault with a semiautomatic firearm, one count of false imprisonment by violence and one count of possession of a firearm by a felon, with firearm and prior conviction allegations found true. The trial court sentenced Babers to state prison for a term of 200 years plus life with the possibility of parole after 278 years. He appeals, claiming the evidence was insufficient to support some of his convictions for assault with a semiautomatic firearm, and the trial court improperly used an enhancement for a dual purpose in sentencing him, erred in admitting evidence an unidentified witness had recorded the license plate number of his getaway car and improperly allowed testimony relating to installation of a GPS tracking device on his car.

Although we find the remainder of Babers's contentions to be meritless, as to two counts of assault with a semiautomatic firearm, we find the evidence insufficient to establish the firearm Babers used was semiautomatic. As to these two counts only, Babers's conviction for assault with a semiautomatic firearm is reduced to assault with a firearm, and the matter is remanded to the trial court for resentencing.

FACTUAL AND PROCEDURAL SYNOPSIS

Walgreens (December 16, 2005)

On December 16, 2005, Leslie Fokou and Maria Chavez were working at registers near the front of a Walgreens store located at 5467 Wilshire Boulevard in Los Angeles. A Black man entered, wearing a black mask, dark clothing and black gloves. He pointed a gun at Fokou and placed a black plastic bag on the counter, ordering her to put the money in the bag. Fokou took the cash (about \$500) from her register and placed it in a white Walgreens bag. The gunman took the white bag containing the money, leaving the black bag on the counter.

Chavez was working at the cosmetics counter nearby when the man pointed his gun at her, putting the white bag of money on the counter and ordering Chavez to put the money from her register in the bag as well. Shocked and scared, Chavez complied, and the gunman left with the white bag of money.

That evening, Los Angeles Police Department Officers Peter Kim and Christopher Curry interviewed Fokou, Chavez and Kristopher Coffey (the store manager who was also a witness) and obtained the store surveillance videotape. Fokou gave Officer Kim the black plastic bag the gunman had left behind.

About two weeks later, a forensic print specialist (Jeff Rak) found five latent prints on the black bag. Later, another forensic print specialist (Sandra Claiborne) compared the prints and found a match with Xavier Babers's right middle finger.

Albertsons (December 20, 2005)

Four days after the Walgreens robbery (on December 20), at about 5:00 p.m., Nelson Lopez, Mayra Murillo and Jerome Edwards were working at the Albertsons supermarket at 3433 Sepulveda Boulevard in Los Angeles when a Black man, wearing a black mask, dark clothing and gloves, held a gun over the door of the customer service booth and pointed it at Lopez and Murillo, ordering Lopez to open the safe. Lopez did not have the keys; Edwards did, so Lopez called him over, and the gunman ordered Edwards to open the safe and put the money in the black plastic bag the gunman held out. Edwards placed over \$3,000 in the black bag and handed it to the gunman who then left Albertsons holding the bag of money and his gun.

Right after that, within five minutes, a White man with a paper in his hand entered the store and said the gunman had gotten into a black car driven by a female and he had gotten the license plate number. He held out an Albertson's receipt with "5LGA076" written on the back. Responding "Code 3" to a robbery-in-progress call, Los Angeles Police Officers arrived and interviewed Lopez, Edwards and Murillo. At that time, Edwards gave the receipt paper to Officer Ronald Loomis. That evening the computer

system at the police station matched the license plate number to a four-door, 1992 Infiniti registered to Monique Hatcher.

In December 2005, Monique Hatcher was dating Babers and allowed him to drive her black 1992 Infiniti. She also saw Babers's nephew Larry driving it twice. Her Infiniti stopped working in January 2006. The following month, Hatcher co-signed for a car loan for a burgundy Ford Taurus with the license plate number 4JGZ381 and registered to Hatcher and Babers. Babers was the Taurus's primary driver. Hatcher saw pictures of Tangela Ford (driving the burgundy Taurus) in Babers's bag. As of early May, 2006, Hatcher and Babers's relationship had ended. Hatcher did not see or hear from him after that. Babers kept the Taurus although Hatcher was still a registered owner and responsible for the loan.¹

Office Depot (August 27, 2006)

On August 27, at about 5:00 p.m., Maria Ramirez, Blanca Magana, Samantha Martinez, Sid Salazar and David Regaldo were working at the Office Depot at 6446 Telegraph Road in Commerce. Magana was helping a customer at the register when a man, wearing a black mask, black hood, black pants, black shoes and gloves, pointed a gun at the customer's head, ordering him to the ground. The customer complied. The gunman pointed the gun at Magana, handed her a black plastic bag and ordered her to give him the money from the register. She put the money in the bag and handed it to the gunman.

He ordered Magana to get money from the safe. She told him she was a cashier and did not have the keys so she paged the store manager (Salazar), but he did not respond. Ramirez, another manager, heard Magana's repeated pages over the store intercom and walked toward Magana's register in the front of the store. The masked man

¹ In September 2006, Hatcher learned the car had been impounded.

pointed his gun at Ramirez and told her to open the safe. She said the safe was in the office.

Accompanied by the man pointing a gun at her head, Ramirez walked to the office where Martinez was working inside. Ramirez knocked and asked Martinez to open the door. When she did, Martinez saw the gunman holding a black plastic bag. Pointing the gun at Martinez, the man demanded the money, and Martinez placed about \$9,000 in the gunman's bag. The gunman told Martinez and Ramirez to stay in the cash office, and he closed the door and left with the black bag of money.

During this time, a second man dressed in black and wearing a mask and hood had ordered Magana to place her hands on the counter and told the customer to remain on the floor. Both complied. When the gunman returned from the cash office with his black plastic bag and gun, he said, "Let's go." The gunman and the other masked man left through the front entrance facing the parking lot.

On August 27, at about 5:00 p.m., Juan Villanueva was driving northbound on the 5 freeway in his truck with his girlfriend Christina Lee in the front passenger seat when he saw two masked men, wearing masks, hoods, gloves and black clothing, running alongside the Office Depot next to the 5 freeway in Commerce.² Believing the men were about to rob the store, Villanueva exited the freeway and drove to the front of the Office Depot. He drove around the store toward the back and saw a maroon Ford Taurus parked in the driveway. He drove back around to the front of the store and watched. He then saw two masked men in dark clothing running out of the Office Depot front entrance. The men ran toward the Taurus and Villanueva followed in his truck. When the two men reached the Taurus, one of the men raised his hands, holding money. The two then got into the car.

² Villanueva had prior misdemeanor convictions for false impersonation and spousal battery. At the time of trial, he was on three years probation for transportation with the intent to sell Vicodin.

Villanueva drove past the Taurus. He and Lee saw the driver was a Black female. The Taurus headed north on Telegraph Road, and Villanueva followed. He recited the Taurus's license plate number to Lee and Lee wrote it down: 4JGZ381. When the Taurus reached the Citadel shopping center (with Villanueva and Lee following in the truck), the two men got out. One was still wearing a mask, but Babers was not. He pointed a handgun at Villanueva's truck. Lee told Villanueva about the gun and slouched as Villanueva sped away. Babers and the other man went back to the Taurus. Villanueva saw a police officer, told her what had happened and gave her the paper with the Taurus's license plate. Both Villanueva and Lee identified Babers in photographic six-packs (and later at trial).

On August 29, Babers brought the burgundy Taurus with the license plate 4JGZ381 to the Earl Scheib located at 5710 Crenshaw Boulevard in Los Angeles, requesting that it be painted metallic blue. Two days later, on August 31, at about 1:30 p.m., Babers returned to the paint and body shop to pick up the car. He was driven to Earl Scheib by Tangela Ford in a gray Honda Civic. Babers got out of the Civic carrying a black backpack and carried it into the Earl Scheib office where he was arrested. In his search of the backpack, Detective Alvarado found a black plastic grocery bag containing about \$1980 in cash and Babers's copy of the work order for the Taurus's paint job. After Detective Alvarado introduced himself to Babers and told Babers he would speak to him later, Babers (sitting in a police car) said, "I got nothing to say to you. I know I am going away for a long time."

Babers was charged with 10 counts of second degree robbery (Pen. Code, § 211 [all statutory references are to the Penal Code unless otherwise indicated]; counts 1, 2, 4, 5, 6, 9, 11, 13, 15, 17), 3 counts of false imprisonment by violence (§ 236; counts 3, 21, 24), 10 counts of assault with a semiautomatic firearm (§ 245, subd, (b); counts 7, 8, 10, 12, 14, 16, 18, 19, 20, 23) and 1 count of possession of a firearm by a felon (§ 12021, subd, (a)(1); count 22). As to the 10 robbery counts, it was alleged Babers had used a semiautomatic handgun (§ 12022.53, subd. (b)). As to all 24 counts, it was alleged

Babers had personally used a firearm (a semiautomatic handgun). (§ 12022.5, subd. (a).) As to all 24 counts, it was alleged Babers had two prior serious or violent felony convictions for robbery and armed bank robbery. (§§ 667, subd. (a)(1) and (b)-(i); 1170.12, subds. (a)-(d).) (Count 19 was dismissed.)

At trial, the People presented evidence of the facts summarized above. In addition, the jury saw a DVD with surveillance footage from the Walgreens store at the time of the robbery there. Officer Kim, who had special firearms training and experience, testified the gun pointed at Fokou and Chavez in this footage was a semiautomatic pistol.

Los Angeles Police Department Sergeant Titiriga, the officer in charge of the Major Crimes Division's Technical Support Unit, testified he had placed a G.P.S. tracking device on the exterior of a burgundy Ford Taurus with the license plate 4JGZ381 on August 14, 2006. The device provided data regarding the Taurus's location between August 24 and August 29, 2006. On August 27, the Taurus went to the area of 6520 to 6549 Telegraph Road in Commerce, after traveling from San Diego. On August 29, the Taurus was stopped in the vicinity of 3300 to 3399 West 57th Street in Los Angeles.

In Babers's defense, Dr. Mitchell Eisen testified as an expert regarding memory and eyewitness suggestibility. Tangela Ford, Babers's girlfriend of a year and a half, testified Babers was with her in San Diego on August 26 and 27, 2006, along with Babers's nephew Larry and his girlfriend Gayle.³ On the morning of August 27, Ford said, when she checked out of the motel where they had been staying, Larry, Gayle and the burgundy Taurus were gone.⁴ Ford said she and Babers visited friends in San Diego

³ In February 2006, Ford was arrested with Teisha Butler for misdemeanor commercial burglary at the Glendale Galleria while driving Babers's Taurus; Ford was placed on probation for that offense.

⁴ The motel receipt showed the names of Babers and Monique Hatcher although Ford and Hatcher both testified Hatcher (Babers's ex-girlfriend) was not present that night.

and returned to Los Angeles in her gray Honda around midnight that night. She said Babers had the bag of money at the time of his arrest because Larry had given it to Babers earlier that day to have the Taurus painted and as a partial payment because Larry was going to buy the car from Babers.

Brenda McLemore testified Babers was her baby's uncle. She said Babers and Ford visited her for a few hours on the afternoon of August 27 at her home near San Diego and left later that night.

In rebuttal, Detective Alvarado testified Babers told Ford, "Don't say anything," when Babers was taken into custody.

The jury found Babers guilty as charged on counts 1 through 4, 7 through 18 and 22; counts 5, 6, 19, 20, 21, 23 and 24 were dismissed. It was stipulated Babers was convicted of felonies on two separate dates. The section 12022.5, subdivision (a), firearm allegations were found true on counts 1 through 4, and 7 through 18. The section 12022.53, subdivision (b), allegations were found true on counts 1 through 4, 9, 11, 13, 15 and 17. After Babers waived his right to trial on his prior conviction allegations, the trial court found these true.

The trial court sentenced Babers to state prison for a term of 200 years plus life with the possibility of parole after 278 years. (We will discuss Babers's sentence further in connection with his claim of sentencing error.)

Babers appeals.

DISCUSSION

The Evidence Is Insufficient to Support the Conclusion Babers Used a Semiautomatic Firearm in Committing the Office Depot Crimes.

According to Babers, there was insufficient evidence the firearm used in the Albertsons and Office Depot crimes was a *semiautomatic* firearm so his convictions for assault with a semiautomatic firearm (§ 245, subd. (b)) as to Lee (count 7), Villanueva

(count 8), Edwards (count 10), Murillo (count 12) and Lopez (count 14) must be reversed.

As to the Albertsons crimes (counts 10, 12 and 14), we disagree. In deciding the sufficiency of the evidence, we ask whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 403, internal quotations omitted.)

After discussing his firearms experience and training, Officer Kim testified that, as seen on the surveillance footage played for the jury, the gun Babers pointed at Fokou and Chavez in committing the Walgreens crimes on December 16, 2005, was a semiautomatic weapon (apparently made of stainless steel) because it had no “bulges” and no visible barrel. Chavez described the gun as “silver” and “shiny,” while Fokou said it was “little” and “dark.”

Babers does not dispute that the gun he used in committing the Walgreens crimes (where he left behind a fingerprint on his black plastic bag) was a semiautomatic weapon. In their testimony describing the Albertsons crimes, Murillo said the gun “looked like it was metal,” “a metal color,” “more gray,” and Lopez said the gun was “silver,” “a metal color.” Babers committed these crimes four days after the Walgreens crimes, wearing the same black mask (like a ski mask), dark clothing and gloves, while carrying a black plastic bag and a gun.

The witnesses to the Albertsons crimes described the gun in a manner similar to the testimony of Fokou and Chavez, and none of them described a bulge or any other indication of a visible barrel as would distinguish a revolver. Jurors heard expert

testimony regarding the differences between a semiautomatic weapon and a revolver, and were instructed as to the elements of the assault with a semiautomatic firearm counts. On this record, given the evidence confirming the gun used in the first crimes at Walgreens was a semiautomatic weapon, and the consistent witness testimony relating to the crimes committed just four days later, the jury could conclude Babers used the same weapon (or type of weapon) in committing the Albertsons crimes. These convictions are supported by substantial evidence. (*People v. Young* (2005) 34 Cal.4th 1149,1181; *People v. Maury, supra*, 30 Cal.4th at p. 403.)

With respect to the Office Depot crimes, however, there was insufficient evidence Babers used a semiautomatic weapon to support his convictions for assault with a semiautomatic weapon as to Lee (count 7) and Villanueva (count 8). At the time he committed the Office Depot crimes, Babers was wearing the mask, dark clothing and gloves, and carrying a black plastic bag and a gun, which he later pointed at Villanueva and Lee who were able to identify him because he had taken off his mask. Based on this evidence, the prosecutor argued Babers had used his “signature crime” method at all three stores.

The problem is that the only witness who described the gun used in the Office Depot crimes with any specificity was Maria Ramirez, and she said, “I don’t know much about guns. *I know it was black.*”⁵ (Italics added.) Moreover, the Office Depot crimes were committed more than eight months after the Walgreens and Albertsons crimes, and, unlike the Walgreens and Albertsons crimes, Babers was accompanied on that occasion by another man. On this record, the evidence is insufficient to support the conclusion Babers used a semiautomatic firearm in committing the Office Depot crimes.

⁵ Regarding the gun Babers pointed directly at her, Ramirez further testified: “It’s, I guess, a handgun[,] a small gun.”

According to Babers, citing *People v. Garcia* (1985) 166 Cal.App.3d 1056, and *People v. McElroy* (1989) 208 Cal.App.3d 1415, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, footnote 3 (applying *Garcia* to indistinguishable facts), insufficient evidence he used a semiautomatic firearm in committing the Office Depot crimes compels dismissal of these counts as well as “any necessarily included lesser counts.” We disagree.

Babers’s reliance on these cases is misplaced.⁶ In *Garcia*, the trial court granted the defendant’s motion for acquittal (§1118) on a forcible rape count (§ 261, subd. (2)) without qualification. Thereafter, the prosecutor asked the court to clarify its ruling, opining acquittal of the charged offense did not mean acquittal of the necessarily included offense of attempted rape. The trial court indicated it had not considered lesser included offenses, heard further argument and concluded its prior ruling did not acquit the defendant of the lesser included offense of attempted rape.

After the defendant was convicted of attempted rape, he appealed. The *Garcia* court reversed the conviction of the lesser included offense of attempted rape. “[W]hen the court acquitted the defendant of the charged crime of forcible rape without mention of any lesser included offense, the judgment of acquittal also included the lesser offense of attempted forcible rape. This does not mean that the court was without power to limit its judgment solely to the greater offense leaving the question of defendant’s guilt or innocence of the lesser included offense to be determined in due course during the trial. Since counsel did not request separate consideration of lesser included offenses and since the court did not, on its own motion, indicate an intent to limit its ruling solely to the greater offense, we must conclude that the judgment rendered encompasses all offenses. Once the judgment was rendered the court was without jurisdiction to reconsider or change it.” (*People v. Garcia, supra*, 106 Cal.App.3d at p. 1069; see also *People v. McElroy, supra*, 208 Cal.App.3d at p. 1424 [“trial court may not unqualifiedly acquit a

⁶ He also cites *People v. Parks* (2004) 118 Cal.App.4th 1, 7, but this case involves a lesser *related* offense and provides no support for his argument here.

defendant of the charged offense on the merits, and subsequently modify its ruling to reinstate liability for the same conduct through permitting an amendment to charge a lesser included offense”].) “[A] judgment of acquittal, whether entered by jury verdict or by grant of a section 1118.1 motion, should be accorded equal weight and consequences.” (*People v. McElroy*, *supra*, 208 Cal.App.3d at p. 1424.)

Here, Babers was not acquitted of the assault with a semiautomatic firearm counts; he was convicted. “If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser.” (*People v. Medina* (2007) 41 Cal.4th 685, 702, original italics, citation and internal quotations omitted.) “If a greater offense is reversed on appeal, the lesser included offense may be revived by operation of law. [Citations.]”⁷ (*Ibid.*, citations and footnote omitted; see also §§ 1181, 1260.)

Although the evidence in support of counts 7 and 8 was insufficient to establish Babers used a *semiautomatic* firearm under section 245, subdivision (b), in convicting him of assault with a semiautomatic firearm on these counts, the jury necessarily found Babers had committed assault with a firearm, and there was ample evidence he assaulted Lee and Villanueva with a firearm. (§ 245, subd. (a)(2).) Accordingly, on counts 7 and 8 only, Babers’s convictions for assault with a semiautomatic firearm under section 245, subdivision (b), are reduced to assault with a firearm in violation of section 245, subdivision (a)(2), a lesser included offense of assault with a semiautomatic firearm.

⁷ “The question whether one offense is necessarily included in another arises in various contexts. A common one is deciding whether a defendant charged with one crime may be convicted of a lesser uncharged crime. A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. . . . The reason for this rule is settled. ““This reasoning rests upon a constitutional basis: ‘Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.’ . . .” The required notice is provided as to any charged offense and any lesser offense that is necessarily committed when the charged offense is committed. . . .” (*People v. Reed* (2006) 38 Cal.4th 1224, 1227, citations omitted.)

(*People v. Muszynski* (2002) 100 Cal.App.4th 672, 683-684; *People v. Matian* (1995) 35 Cal.App.4th 480, 488 [subdivision 6 of section 1181 and section 1260 authorize appellate courts to modify a judgment to reflect a conviction of a lesser, necessarily included offense when the state of the evidence warrants it]; and see *People v. Davidson* (2008) 159 Cal.App.4th 205, 211, citation and internal quotations omitted, [“[S]ound judicial policy requires defendants who are fairly tried and convicted remain responsible for those crimes they were found to have committed”].) The matter is remanded to the trial court for resentencing in light of this modification. (*People v. Muszynski*, *supra*, 100 Cal.App.4th at p. 684; *People v. Navarro* (2007) 40 Cal.4th 668, 681 [after modification under sections 1181, subdivision 6, and 1260, remand for resentencing is appropriate so the trial court can exercise its sentencing discretion in light of the changed circumstances].)

The Trial Court Properly Sentenced Babers on Counts 16 and 18.

According to Babers, his sentence must be reduced by 10 years on each of the remaining assault with a semiautomatic firearm counts (counts 16 and 18) because the trial court erred by using the section 12022.5, subdivision (a), enhancement in calculating the term pursuant to section 1170.12, subdivision (c)(2)(A)(iii), or section 667, subdivision (e)(2)(A)(iii), and then imposing the 10-year section 12022.5, subdivision (a), enhancement on these counts. Leaving to one side the issue of whether Babers forfeited this issue by failing to raise it in the trial court (see *People v. Scott* (1994) 9 Cal.4th 331, 353), the trial court did not make improper use of section 12022.5, subdivision (a), on these counts, pursuant to the Three Strikes Law (§§ 1170.12, subd. (c)(2)(A)(iii), 667, subd. (e)(2)(A)(iii)).

As the Attorney General notes, section 1170.12, subdivision (c)(2)(A) provides as follows:

“(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has

a prior felony conviction: [¶] . . . [¶] (2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of [¶] (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or [¶] (ii) twenty-five years or [¶] (iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, *including any enhancement applicable* under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.” (Italics added.)

Similarly, section 667, subdivision (e)(2)(A) provides: : “(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] . . . [¶] (2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions. [¶] (ii) Imprisonment in the state prison for 25 years. [¶] (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, *including any enhancement applicable* under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.” (Italics added.)

Neither section 1170.12, subdivision (c)(2)(A), nor the indeterminate term imposed thereunder is a sentence enhancement; rather, this provision prescribes a method by which a defendant’s minimum indeterminate term is calculated. (*People v. Dotson* (1997) 16 Cal.4th 547, 556.) Once the minimum indeterminate term is calculated, “other enhancements or punishment provisions,” such as section 667, subdivision (a),

enhancements, are added as a separate determinate term to the indeterminate term under options (i), (ii), and (iii). (*People v. Dotson, supra*, 16 Cal.4th at p. 559, citation omitted.) Consequently, “the three strikes law expressly subjects a defendant to a separate determinate term for enhancements, even when those enhancements are used in calculating the minimum indeterminate life term.” (*Id.* at p. 560.) The trial court did not err.

Babers Has Failed to Demonstrate Prejudicial Error in the Trial Court’s Admission of Evidence Relating to the License Plate of his Getaway Car.

Babers says his convictions relating to the Albertsons crimes (counts 9-14) should be reversed because they are based on a document lacking sufficient foundation (the receipt with the Taurus’s license plate number on it provided by an unidentified man) and inadmissible hearsay (the unidentified man’s explanatory statements). We disagree.

Lopez testified the unidentified man came in “right after” the gunman left (before police responding “Code 3” had arrived), entering through the same door the gunman exited. Lopez noted the man’s manner, “tone of speech,” and the “way he talked,” and said the man was not speaking slowly or calmly and “looked kind of worried.”

Lopez said the unidentified man told him he got the license plate number of the car the gunman got into—a black car driven by a Black female. He held a paper with a license plate number on it and handed it over. Officer Loomis testified Edwards gave him the paper when Loomis arrived shortly after the robbery.

For the reasons stated in *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177-179, and *People v. Rincon* (2005) 129 Cal.App.4th 738, 753-754, we find no error in the trial court’s admission of this evidence under Evidence Code section 1240 and 1241. Moreover, because these spontaneous statements were not “testimonial” within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36, we find no Confrontation Clause violation. (*People v. Rincon, supra*, 129 Cal.App.4th at pp. 755-757; *People v. Corella* (2004) 122 Cal.App.4th 461, 469.)

Babers Has Failed to Demonstrate Prejudicial Error in the Admission of the GPS Testimony.

Babers moved to suppress evidence resulting from the use of a GPS device on his Taurus, and the trial court conducted a hearing. Sergeant Titiriga explained that the device was self-contained, did not have to be wired, and was installed on the exterior of the Taurus while the car was parked on the street. When defense counsel sought to probe further into the placement of the device, Sergeant Titiriga stated: “For the protection of the case itself and the evidence, I prefer not to answer that question at this time for further investigations that we conduct regarding various crimes of violence[,] of murder. . . .” (See Evid. Code, § 1040 [privilege for official information].) The trial court denied the motion and when defense counsel raised the issue again at trial, the trial court found the subject matter defense counsel sought ((1) the exact description of the device, (2) the exact location of the device, and (3) the details of the officers’ deployment, conduct and attire) to be appropriate for the officer’s invocation of Evidence Code section 1040. Sergeant Titiriga specifically confirmed he did not have to break into the car and placed the device on the car’s exterior and testified the remaining areas of inquiry would jeopardize ongoing investigations and officer safety.

The GPS evidence simply tracked the travel of Babers’s Taurus around the time of the Office Depot crimes—from San Diego to the vicinity of the Office Depot and then the paint shop. After witnessing Babers and another masked man dressed in black running to Office Depot and then running back to the Taurus (one of the men holding up money), Villanueva and Lee recorded Babers’s license plate and then saw Babers face-to-face and unmasked as he pointed a gun at them. Both identified Babers in photographic six-packs after the crimes and at trial. Babers has failed to demonstrate prejudicial error in the trial court’s denial of his motion seeking further details of the GPS device and its placement without further hearing. (See *People v. Lewis* (2009) 172 Cal.App.4th 1426, 1441, internal quotations and citation omitted [“[T]he test of materiality is . . . whether

the non-disclosure might deprive defendant of his or her due process right to a fair trial. . . .”].)

DISPOSITION

The judgment is reversed. As to counts 7 and 8 only, Babers’s convictions for assault with a semiautomatic firearm under section 245, subdivision (b), are reduced to assault with a firearm in violation of section 245, subdivision (a)(2). The matter is remanded for resentencing in light of these changes.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.